In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-166

FIDELITY TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 515 F.2d 684, and the court's order denying rehearing (Pet. App. 34a-93a) is reported at 515 F.2d 703. The decision of the Federal Communications Commission (Pet. App. 94a-119a) is reported at 44 F.C.C. 2d 123 and the Initial Decision of the Commission's Administrative Law Judge

(Pet. App. 121a-282a) is reported at 44 F.C.C. 2d 149.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1975. A timely petition for rehearing and suggestion of rehearing en banc was denied on June 30, 1975, and the petition for a writ of certiorari was filed on July 30, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's conclusion that the competing license applicants were equal under its comparative hearing criteria was supported by substantial evidence.
2. Whether the Federal Communications Commission could appropriately determine that where competing applicants were found to be equal under its comparative hearing criteria, the public interest would best be served by allowing continuation of the existing service.

STATUTORY PROVISIONS INVOLVED

Relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at Pet. 4-6.

STATEMENT

1. On August 31, 1965, RKO General, Inc., filed an application for renewal of a license covering its

station KHJ-TV, Channel 9 at Los Angeles. On October 25, 1965, petitioner Fidelity Television, Inc., filed an application for a construction permit to build a station at Norwalk, California, to operate on Channel 9 and serve the Los Angeles area. Since the applications were mutually exclusive, the Commission ordered a hearing to determine which of the proposals would better serve the public interest.

2. During the course of the comparative proceedings, the United States filed a civil antitrust suit against RKO General's corporate parent, General Tire and Rubber Company, alleging that the latter had engaged in illegal reciprocal trading practices. The Administrative Law Judge reopened the hearing and received evidence relating to RKO's alleged involvement in anticompetitive practices, in order to determine whether the reciprocal dealings reflected adversely upon RKO's character under the standard comparative criteria (Pet. App. 6a-7a). After a lengthy evidentiary hearing, the Administrative Law Judge concluded that neither applicant was a "bargain," but ruled in favor of petitioner's application "without much enthusiasm" (Pet. App. 280a).

On review, the Commission concluded that although KHJ-TV had been involved in noncoercive reciprocal trade practices, the fact that such conduct had not been clearly held to be unlawful at that time precluded a finding that RKO had engaged in knowing or wilful misconduct. In view of RKO's previously unblemished record as a broadcaster, the Commission

concluded that its trade practices did not merit either disqualification or the assessment of a comparative demerit against its application (Pet. App. 100a-101a).[1]

The Commission found that the two applicants were equally qualified (Pet. App. 107a-108a) and that the public interest would best be served by the continuation of the existing service. It therefore granted RKO's application and denied that of petitioner (Pet. App. 108a-109a).

3. The court of appeals affirmed the Commission's order. It held that the Commission's decision that RKO General's reciprocal trade practices did not merit either a disqualification or a comparative demerit was neither arbitrary, capricious nor illegal in view of the legal and economic circumstances in which the practices occurred and because the Commission had retained jurisdiction over that question pending its decision in another comparative hearing involving an RKO station (Pet. App. 20a-24a). The court also held that the Commission's decision that the traditional comparative factors offered no basis for making a choice between the two applicants was supported by substantial evidence (Pet. App. 26a-32a). In such circumstances, the court held, it was

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[1] The renewal of RKO's license for Station KHJ-TV was conditioned upon the Commission's determination of issues pertaining to RKO's competitive practices and character fitness that had been made the subject of a license renewal proceeding involving RKO station WNAC-TV in Boston (Pet. App. 96a-97a). Its decision with respect to anticompetitive practices therefore is open to further consideration.

not reversible error for the Commission to award the license to the incumbent (Pet. App. 32a).

The court declined to rehear the case, but issued a second opinion emphasizing that it did not intend to sanction any general preference for incumbent licensees in a comparative renewal proceeding. Rather, it limited its holding to a situation in which the incumbent had established that it was as qualified to serve the public interest as was its challenger (Pet. App. 34a-38a). The court also emphasized the limited nature of its holding by pointing out that the Commission's comparative hearing criteria had changed since the evidence had been received in this case, and that its decision was, therefore, of little precedential value (Pet. App. 37a).

ARGUMENT

The decision of the court of appeals is correct and presents no question of general importance requiring review by this Court. The Commission compared the proposals of two applicants to determine which applicant would better serve the public interest. The court of appeals held that the Commission's decision was supported by substantial evidence, and stated that its decision was of no precedential importance. Petitioner, in essence, is asking this Court to substitute its judgment for that of the Commission, a function this Court has held to be inappropriate. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229.

1. Petitioner contends that the First Amendment compels the Commission to grant a comparative advantage to whichever applicant holds the fewer interests in other broadcast facilities (Pet. 12-17). This contention is insubstantial. The First Amendment does not compel the Commission to increase diversity in either ownership or presentation of opinion. *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94. Diversity is, however, an important value that the Commission must consider in order to satisfy the requirements of the Communications Act, and it has done so here (Pet. App. 104a-105a).

While the Commission has, on a number of occasions, awarded a comparative advantage to the party having fewer media holdings, it is within the Commission's discretion to decide how much significance to attach to diversification of media ownership in an individual comparative proceeding. *McClatchy Broadcasting Co.* v. *Federal Communications Commission*, 239 F.2d 15, 18 (C.A.D.C.). Here, the Commission concluded that the existence of numerous other media outlets in the area and KHJ-TV's record of independent operation (Pet. App. 31a) precluded a mechanistic approach that would have ascribed a comparative demerit solely because of RKO's other media holdings. The court of appeals correctly concluded that the Commission's decision on the diversification of ownership issue was supported by substantial evidence and did not conflict with its prior decisions (Pet. App. 30a-31a).

2. Petitioner contends (Pet. 17-20) that the Commission abused its discretion by refusing to disqualify or assess a comparative demerit against RKO for its reciprocal trade practices. But the Commission's decision with respect to reciprocity is subject to reconsideration in a related proceeding; it renewed KHJ-TV's license conditionally pending completion of other hearings and decisions regarding RKO's trade practices (Pet. App. 99a-101a, 108a-109a). In any event, the Commission's decision was proper. Although the federal antitrust laws undoubtedly are relevant to the Commission's assessment whether the licensee's conduct comports with the public interest standard of the Communications Act (*United States* v. *Radio Corporation of America*, 358 U.S. 334, 351; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 222-224), the Commission could properly balance RKO's trade practices against its unblemished record over twenty-five years as a broadcaster and the uncertain state of the antitrust laws relating to noncoercive reciprocity at that time. In these circumstances, the court of appeals correctly held that the Commission did not abuse its discretion (Pet. App. 23a-24a).

3. Petitioner's claim (Pet. 21-23) that the Commission should not have considered petitioner's failure to comply with certain Commission reporting requirements is unfounded. As a general matter, the Commission prefers applications in which the owners intend to participate in the management of the station's day-to-day operations. The Commission con-

cluded that on paper petitioner had proposed a quantitatively superior integration of ownership and day-to-day operation. However, both the Commission and the Administrative Law Judge concluded that it was unrealistic to believe that petitioner's paper promises would be fulfilled, since most of its owners would be pursuing other full time jobs. The Commission considered petitioner's reporting violations only as corroboration of its conclusion that petitioner's ownership integration superiority was theoretical rather than real (Pet. App. 107a). The Commission's decision with respect to the credibility of petitioner's assertions was supported by substantial evidence, and any error in considering such matters was harmless. See Pet. App. 36a-38a; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 496.

4. Petitioner's argument (Pet. 23-25) that the Commission preferred RKO's application simply because of "the *fact* that it was operating on the frequency" (Pet. 25) is erroneous. The Commission determined, after carefully examining all of the evidence, that both appliacnts were equally qualified. The Commission then concluded that the public interest would best be served by continuation of the existing service (Pet. App. 108a). While that judgment gave the incumbent some advantage, the advantage results from consideration of the public interest. Moreover, the advantage arises only if, after the full hearing required by statute, the two qualified applicants appear equal. The Commission is under a duty to award the license to one applicant

or the other, and it is appropriate for the Commission to look directly to the public interest, as it did here, in order to break the tie, rather than to decide the matter arbitrarily.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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